Filed 3/28/02

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re the Marriage of MARGARET C. JAMES and GLYN JAMES.	
MARGARET C. JAMES, Respondent, v. GLYN JAMES, Appellant.	C036324 (Super. Ct. No. SC300828)

In an action for dissolution of marriage, appellant Glyn James (Glyn),[1] appeals from the judgment on reserved issues and from the order after hearing denying his motion to set aside the judgment. He seeks to modify the "equalizing payment" ordered by the trial court.

[1] In the interests of clarity and convenience, we refer to the parties by their first names.

Glyn raises two claims on appeal. He contends the trial court erred (1) by treating the *Epstein*[2] credit as a community debt and assigning it to him and (2) by characterizing a bank account, called the Abbey account, as community property rather than as an account that contained, in part, his separate property. We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Glyn and Margaret were married on June 14, 1980, while living in England, and moved to the United States in 1981. They separated on July 15, 1997. After separation, Glyn was ordered to pay Margaret temporary spousal support in the amount of $2,264. From that amount, Margaret was ordered to pay on a monthly basis, the mortgage on the family residence where she continued to reside, the homeowner's insurance and the car insurance.

Dissolution of marriage was granted May 4, 1998, with remaining contested issues reserved.

A trial was held to determine the reserved issues, which, inter alia, included the balance and character of the funds in the Abbey account at the time of separation. The trial court found the amount in the Abbey account at the time of separation was 12,169 pounds and that no evidence was presented to rebut the presumption the account was community property. The trial court also awarded Margaret $2,500 in spousal support and an

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[2] *In re Marriage of Epstein* (1979) 24 Cal.3d 76 (hereafter *Epstein*).

equalizing payment of $7,927.39. We discuss the facts in detail in the opinion.

Glyn moved to set aside the judgment on the grounds the equalizing payment was erroneously calculated due to a misapplication of the *Epstein* credit. The trial court denied the motion and ordered him to make the payment in three equal installments of $2,642.47. Glyn filed a timely notice of appeal from the judgment on reserved issues and from the order after hearing.

DISCUSSION

I. Abbey Account

Glyn contends the trial court erroneously characterized the funds in the Abbey account as community property rather than comprised of both community and separate property. He argues his own credible testimony on the source of the property need not be corroborated where, as here, the corroboration is not available. Margaret, who appears without counsel on appeal, argues that Glyn admitted in court he had withdrawn 10,000 pounds, the equivalent of $15,000, from the Abbey account and deposited it in an account in Wales in violation of the restraining order.

We find the trial court did not abuse its discretion because Glyn failed to present documentary evidence to overcome the presumption the Abbey account was community property.

Glyn testified that he and Margaret kept funds in a bank account at the Abbey National Bank, which the parties referred

to as the Abbey account, that the community portion of the funds is $9,693, and Margaret is entitled to one-half of that amount.

Glyn explained the account was comprised of funds from two sources. The original deposit was 1,160 pounds or $887, and Margaret had a full one-half interest in those funds. The additional funds came from a deposit of about $15,000, only 43 percent of which was community property because it derived from funds he had before his marriage to Margaret.

The claimed separate property funds came from a payout of a life insurance policy from Friends Provident Life which Glyn purchased in 1960,[3] and upon which he continued to pay premiums with community funds during the marriage. When the policy matured in 1993, he deposited the proceeds from the policy into the Abbey account. He testified that he calculated the value of the community property in the account, calculated the interest on that portion of the account, and did it "as fairly and accurately as I was able to." Glyn also introduced in evidence recent statements of the Abbey account.

Margaret objected to Glyn's testimony as unsupported by documentary evidence that adequately traced the source of the funds in the Abbey account. The trial court found the amount in the account on the date of separation was 12,169 pounds and the parties agreed, that based upon the conversion rate at that time, the value in dollars was $19,470.

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[3] Glyn provided a record of that policy to the court, however that document does not reflect the original purchase date.

Glyn contends the trial court erroneously found the Abbey account was community property despite his testimony he deposited his separate property funds into the account.

Funds acquired during marriage while domiciled in this state are community property (Fam. Code, § 760),[4] and property acquired by the parties during marriage in joint form is presumed to be community property. (§ 2581.) Glyn testified he deposited the proceeds from the Provident Friends insurance policy into the "Abbey account" in 1993, during the marriage. The funds in the account are therefore presumed to be community property and the "burden is on the spouse asserting its separate character to overcome the presumption. [Citations.]" (*See v. See* (1966) 64 Cal.2d 778, 783; *In re Marriage of Mix* (1975) 14 Cal.3d 604, 611.)

Nevertheless, the commingling of separate and community property does not alter the status of the separate property interest if the funds can be traced to its separate property source. (*Hicks v. Hicks* (1962) 211 Cal.App.2d 144, 157; *In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 822-823; *In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1057-1058.) However, if the funds have been commingled so that the respective contributions cannot be traced and identified, the entire fund will be deemed community property. (*In re Marriage*

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[4] A reference to a section is to the Family Code.

of Mix, supra, 14 Cal.3d at p. 611; *In re Marriage of Braud, supra,* 45 Cal.App.4th at p. 823.)

"Whether the spouse claiming a separate property interest has adequately traced an asset to a separate property source is a question of fact for the trial court, and its finding must be upheld if supported by substantial evidence." (*In re Marriage of Braud, supra,* 45 Cal.App.4th at p. 823; *In re Marriage of Cochran, supra,* 87 Cal.App.4th at pp. 1057-1058.)

Tracing "requires *specific records* reconstructing each separate and community property deposit, and each separate and community property payment as it occurs. Separate property status cannot be established by mere oral testimony of intent or by records that simply total up all separate property funds available during the relevant period and all the separate expenditures during that period; such records do not adequately trace to the source of the purchase at the time it was made." (*In re Marriage of Braud, supra,* 45 Cal.App.4th at p. 823, (orig. emphasis.)

Here, Glyn introduced no records to establish the separate property character of the Abbey account. He merely testified the original deposit in the Abbey account was community property, that during the marriage he deposited $15,000 into that account, and that 43 percent of that $15,000 deposit constituted community funds.[5] While Glyn introduced recent bank

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[5] The trial court was not obligated to find Glyn's testimony regarding the "Abbey account" credible or of solid value where

statements from the Abbey account in evidence, these statements tell us nothing about the source of the $15,000 deposit.

In sum, Glyn conceded the Abbey account was comprised of commingled funds and failed to provide any records that traced and identified the source of those funds to separate property. Accordingly, the trial court properly deemed the Abbey account community property.

II. *Epstein* Credit

Glyn contends the trial court made a mathematical error in calculating the equalizing payment he owed Margaret by misapplying the *Epstein* credit. He argues the trial court erroneously treated the $10,579 *Epstein* credit as a community debt and assigned it to him. He claims that correctly calculated, Margaret owes him an equalizing payment of $10,498. Margaret argues that Glyn is not entitled to reimbursement for

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his calculations were inaccurate and inconsistent. (Compare *In re Marriage of Mix, supra,* 14 Cal.3d at p. 614.) Glyn testified that the original deposit in the Abbey account was 1,160 pounds, which he stated was equal to $887, although after further questioning, he agreed that the original deposit was $1,867. He also testified that 43 percent of the $15,000 deposit was community property, "so the total amount of community property is the sum of $1,867 plus 43 percent of $15,000 which amounts to $963. If you divide that up by two, it becomes $4,847." Even assuming Glyn's characterization of the funds is correct, by our calculations, the value of the community property interest is $4,158.50, not $963 or $4,847 as Glyn testified. The trial court could therefore conclude that his testimony did not constitute substantial evidence. (*People v. Marshall* (1997) 15 Cal.4th 1, 31 ["Evidence is substantial if it is reasonable, credible and of solid value."].)

the *Epstein* credit because the spousal support payment was totally inadequate.

We conclude the trial court correctly applied the *Epstein* credit by subtracting the amount of that credit from the total net value of the community funds before their distribution.

During the marriage, there is a general presumption that, in the absence of an agreement between the parties, a party who utilizes his separate property for community purposes intends a gift to the community, and is not entitled to reimbursement for that gift. (*See v. See, supra,* 64 Cal.2d at p. 785.) However, this presumption does not apply "to the situation in which, after separating, the party uses his separate property for payments on preexisting community obligations." (*Epstein, supra*, 24 Cal.3d at p. 83.) In this latter situation, where the parties have separated in anticipation of dissolution of marriage, the rational basis for presuming a donative intent is no longer present. (*Id*. at p. 84.)

Thus, in *Epstein, supra,* the California Supreme Court adopted the view expressed in *In re Marriage of Smith* (1978) 79 Cal.App.3d 725, as its own, holding that except in limited circumstances, subject to proof, "'a spouse who, after separation of the parties, uses earnings or other separate funds to pay preexisting community obligations should be reimbursed therefor *out of the community property* upon dissolution.'" (*Id*. at p. 84, quoting *Smith, supra,* at p. 747, emph. added).)

In the proceedings below, neither the fact nor the amount of the *Epstein* credit was in dispute. Margaret conceded in

various court documents that Glyn was entitled to an *Epstein* credit and ultimately stipulated to a credit in the amount of $10,579.

Failure to raise a claim in the trial court waives that claim on appeal. (*In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, pp. 444-445.) Because Margaret stipulated to the amount of the *Epstein* credit, she has waived her claim that Glyn is not entitled to that credit on the grounds her temporary spousal support payment was insufficient. (See *Epstein, supra*, 27 Cal.3d at p. 85, quoting *In re Marriage of Smith, supra,* 79 Cal.App.3d at p. 747 [“reimbursement should not be ordered where the payment on account of a preexisting community obligation constituted in reality a discharge of the paying spouse’s duty to support the other spouse . . . .”].)

The trial court awarded Glyn the full *Epstein* credit. Thus, the only issue before us is whether the trial court properly applied the credit so that the net equalizing payment was correctly calculated. We conclude it was.

Although Glyn provides no citations to the record in his opening brief, according to documents filed with the court by Glyn, he had $105,445 in undivided community assets and $18,902 in community debt for a net total of $86,543. Margaret had a net community asset of $8,316. The net value of the community property, which is the combined total of Glyn’s net community assets and Margaret’s net community asset ($86,543 plus $8,316), was $94,859,00 less the *Epstein* credit of $10,579, to be paid to

Glyn, for a total community net value of $84,280. Each spouse therefore was entitled to one-half of that amount (§ 2550; *In re Marriage of Cream* (1993) 13 Cal.App.4th 81, 88), or $42,140. Margaret, having received $8,316, was therefore entitled to an equalizing payment of $33,824. Prior to judgment, Glyn made two payments to Margaret totaling $25,596 towards the equalizing sum, leaving an unpaid balance of $8,228 owed to Margaret. The court awarded her an equalizing payment of $7,927.39. Margaret does not contest the discrepancy.[6]

Stated another way, Glyn was entitled to receive one-half the community property or $42,140 plus the *Epstein* credit for a total of $52,719. He was awarded a net total of $86,543 less $33,523 ($25,596 plus $7,927.39), the total amount he was required to pay Margaret, for a total net value to Glyn of $53,020.[7]

Glyn's claim that Margaret owes him $10,498, is unsupported by citations to the record and is inconsistent with component sums contained in the record and found by the trial court. More specifically, Glyn claims he was awarded $2,862 from the Abbey account, while the court found that at the time of separation,

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[6] Margaret does not contest the discrepancy between the $8,228 and the $7,927.39 awarded to her by the trial court. It appears from documents filed by Glyn in the trial court that he owed her an additional $200 and he was entitled to some additional credits that could account for the difference between these two figures.

[7] See footnote 7 to explain the discrepancy between $52,719 and $53,020.

the Abbey account had 12,169 pounds in it, an amount the parties agreed was worth $19,470.

Glyn does not challenge the trial court's factual finding on this issue. As discussed in part I, his only direct challenge was to the classification of the Abbey account as community property and we rejected the claim.

To overcome the trial court's factual finding, Glyn must establish there is no substantial evidence to support it. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) To the extent Glyn claims the trial court's finding of fact is not sustained by the evidence, he is "'required to set forth in [his] brief *all* the material evidence on the point . . . . Unless this is done the error assigned is deemed to be waived.'" *(Ibid.,* quoting *Kruckow v. Lesser* (1952) 111 Cal.App.2d 198, 200, orig. emphasis.) Accordingly, because Glyn has failed to raise a substantial evidence claim and has also failed to meet the stated test, we are bound by the trial court's finding of fact. Therefore, in resolving Glyn's present claim, we will presume the Abbey account held $19,470 at the time of separation.

Glyn also misapplies the *Epstein* credit by subtracting that credit from Margaret's half of the community property rather than from the value of the undivided community. *Epstein* requires reimbursement to a spouse who, after separation, pays community debts out of his separate property. Because the debt is a community debt, both parties must share the reimbursement charge. As a community debt, it must be paid

"'*out of the community property.*'" (*Epstein, supra,* 24 Cal.3d at p. 84, quoting *In re Marriage of Smith, supra,* 79 Cal.App.3d at p. 747.)

Instead, Glyn seeks to have the credit deducted from Margaret's share of the community property after the equalization payment has been calculated. Applied in that manner, the *Epstein* credit would be paid in full by Margaret from her separate property, treating it as her separate debt rather than as a debt of the community as required by *Epstein*. Glyn's method is erroneous.

A reimbursement award must come off the top of the community property award before the community property interest is divided. Accordingly, we find the trial court properly applied the *Epstein* credit.

DISPOSITION

The judgment is affirmed. Respondent is awarded her costs on appeal. (Cal. Rules of Court, rule 26(a).)

BLEASE, Acting P. J.

We concur:

DAVIS, J.

RAYE, J.